

STATE OF WISCONSIN
Department of Commerce

In the matter of the PECFA Appeal of

Linda K. Fine
Washburn County Highway Dept.
342 Walnut Street
Spooner, WI 54801-1385

PECFA Claim 454801-9999-02
Hearing #96-24

Final Decision

PRELIMINARY RECITALS

Pursuant to a petition for hearing filed June 16, 1995, under s. 101.02(6)(e), Wis. Stats., and ILHR 47.53, Wis. Adm. Code, to review a decision by the Department of Industry, Labor and Human Relations, now Department of Commerce, a hearing was held on August 20, 1996, at Madison, Wisconsin. A proposed decision was issued on November 12, 1996, and the parties were provided a period of twenty (20) days to file objections. Appellants filed an objection to the proposed decision on November 27, 1996.

The issue for determination is:

Whether the department's June 1, 1995 decision denying reimbursement of costs submitted under the PECFA program in the amount of \$11,073.39 was correct.

There appeared in this matter the following persons:

PARTIES IN INTEREST:

Linda Fine
Washburn County Highway Commissioner
342 Walnut Street
Spooner, WI 54801-1385

Washburn County Highway Department
342 Walnut Street
Spooner, WI 54801-1385

Wisconsin Department of Commerce
Environmental Regulatory Services Division
201 East Washington Avenue
P.O. Box 7969
Madison, WI 53707-7969

The authority to issue a final decision in this matter has been delegated to the undersigned by order of the Secretary dated August 21, 1996.

The matter now being ready for decision, I hereby issue the following

FINAL DECISION

The proposed decision dated November 12, 1996 is hereby adopted as the final decision of the department.

NOTICE TO PARTIES

Request for Rehearing:

This is a final decision under s. 227.48, Wis. Stats.. If you believe this decision is based on a mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision and which you could not have discovered sooner through due diligence. To ask for a new hearing, send a written request to Department of Commerce, Office of Legal Counsel, P.O. Box 7946, Madison, WI 53707-7946.

Send a copy of your request for a new hearing to all the other parties named in this decision as "PARTIES IN INTEREST".

Your request must explain what mistake the hearing examiner made and why it is important. Or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain how your request for a new hearing is based on either a mistake of fact or law or the discovery of new evidence which could not have been discovered through due diligence on your part, your request will have to be denied.

Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in Sec. 227.49 of the state statutes.

Petition for Judicial Review:

Petitions for judicial review must be filed no more than thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one). The petition for judicial review must be served on the Department of Commerce, Office of the Secretary, 123 W. Washington Avenue, 9th Floor, P.O. Box 7970, Madison, WI 537077970.

The petition for judicial review must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for judicial review is described in Sec. 227.53 of the state statutes.

Dated and mailed: December 16, 1996

STATE OF WISCONSIN
DEPARTMENT OF COMMERCE

IN THE MATTER OF: The claim for

MADISON HEARING OFFICE
1801 Aberg Ave., Suite A

reimbursement under the PECFA
Program by

P.O. Box 7975
Madison, WI 53707-7975
Telephone: (608) 242-4818
Fax: (608) 242-4813

LINDA K. FINE,
WASHBURN COUNTY HIGHWAY DEPARTMENT,
Appellant,

vs.

WISCONSIN DEPARTMENT OF COMMERCE,
Respondent.

Hearing Number: 96-24
Re PECFA Claim No. 54801-9999-02

PROPOSED HEARING EXAMINER DECISION

NOTICE OF RIGHTS

Attached are the Proposed Findings of Fact, Conclusions of Law, and order in the above-captioned. Any Party aggrieved by the Proposed decision must file written objections to the findings of fact, conclusions of law and order within twenty (20) days from the date this Proposed Decision is mailed.
- It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your objections and argument to: Madison Hearing office, P.O. Box 7975, Madison, WI 53707-7975. After the objection period, the hearing record will be provided to Patrick J. Osborne, Executive Assistant of the Wisconsin Department of Commerce, who is the individual designated to make the FINAL Decision of the Department of Commerce in this matter.

HEARING EXAMINER:

Robert C. Junceau

DATED AND MAILED:

November 12, 1996

MAILED TO:

Appellant's Attorneys:

Kris Moelter, Attorney
Steven R. Cray, Attorney
Wiley, Wahl, Colbert, Norseng
Cray & Herrell, S.C.
1280 Clairemont Avenue
P.O. Box 629
Eau Claire, WI 54702-0629
(715) 723-8591

Respondent's Attorney:

Jorge L. Fuentes, Attorney
U.I. Bureau of Legal Affairs
Department of Workforce Development
201 East Washington Avenue
P.O. Box 8942
Madison, WI 53708
(608) 266-1639

**STATE OF WISCONSIN
BEFORE THE
DEPARTMENT OF COMMERCE**

LINDA K. FINE,
WASHBURN COUNTY HIGHWAY DEPARTMENT
342 Walnut St.
Spooner, WI 54801-1385

Appellant,

vs.

WISCONSIN DEPARTMENT OF COMMERCE

Respondent.

Hearing No. 96-24

PECFA CLAIM # 54801-9999-02

PROPOSED DECISION

This is a timely appeal by appellant pursuant to section 101.02(6)(e) , and Chapter ILHR 47.51(1) of the Wisconsin Administrative Code of a Department of Industry, Labor and Human Relations order dated June 1, 1995 denying, in part, appellant's claim for, reimbursement under the Petroleum Environmental Cleanup Fund Act (PECFA) program in the amount of \$11,073.39.

Evidentiary hearing was held on August 20, 1996 before Administrative Law Judge Robert C. Junceau of the Department of Workforce Development (formerly the Department of Industry Labor and Human Relations, acting as a hearing examiner for the Department of Commerce. After hearing each party submitted written briefs.

The appellant appeared by Attorney Kris Moulter of Wiley, Wahl, Colbert, Norseng, Cray and Herrell, S.C., of Eau Claire, Wisconsin, with whom on the briefs was Attorney Steven R. Cray of the same firm.

The respondent appeared by Attorney Jorge L. Fuentes of the Wisconsin Department of Workforce Development, Madison, Wisconsin.

Parties in interest are:

Linda Fine
Washburn County Highway Commissioner
342 Walnut Street
Spooner, WI 54801-1385

Washburn County Highway Department
342 Walnut Street
Spooner, WI 54801-1385

Wisconsin Department of Commerce
Environmental Regulatory Services Division
201 East Washington Avenue
P.O. Box 7969
Madison, WI 53707-7969

The issue for decision on appeal is whether the department's decision dated June 1, 1995, denying the appellant's claim for reimbursement under the PECFA program in the amount of \$11,073.39 was correct.

PROPOSED FINDINGS OF FACTS

1. In late 1992, the appellant selected Owen Ayres and Associates, ("Ayres"), a Wisconsin corporation which provides professional engineering and consulting services, as a consultant for remediation work which became necessary as the result of the removal of an underground petroleum storage tank in 1992.

2. On or about June 4, 1993 Ayres obtained competitive bids for soil borings from three separate contractors and for laboratory analysis from three other contractors. Ayres did not obtain bids for monitoring wells or water sampling. The lowest bids were from Environmental Foundation and Drilling, Inc. ("EFD") for the soil boring and from Mid-States Associates, Inc. ("MSA"), for the laboratory analysis.

3. After work began, Ayres discovered that the contamination from the underground storage tank removed had spread to the water table. This required installation of monitoring wells and additional laboratory work analyzing water samples. Although Ayres did not anticipate the need for the installation of monitoring wells in this project, such contingency was possible since monitoring wells are necessary in about half of these types of projects.

4. Ayres utilized EFD to do installation of the monitoring wells and MSA to do the related the lab analysis. Ayres did not solicit competitive bids for that additional work.

5. Appellant submitted a PECFA reimbursement claim in the amount of \$43,008.46 to the respondent, then the Department of Industry, Labor and Human Relations, which administered the PECFA reimbursement program until July 1, 1996. Effective July, 1, 1996, as the result of legislation, the PECFA program was moved to the Wisconsin Department of Commerce, which is the successor as respondent in this matter as a matter of law.

6. Of the appellant's total claim, the department paid \$27,963.32 and denied \$11,073.39 as ineligible for reimbursement. The amount denied included \$7,752.50 for costs for the monitoring wells and related laboratory analysis. This was denied reimbursement because Ayres had not satisfied the respondent that it used the lowest bidders in the performance of that additional work.

7. After its reimbursement claim for costs of installation of monitoring wells and related laboratory costs was denied, Ayres submitted to the respondent competitive bids on other projects by two of the contractors which bid on the soil borings and by the three contractors which bid on the laboratory

analysis. One of the unsuccessful soil boring contract bidders for the appellant's project gratuitously listed unit prices for monitoring wells on its bid. With that exception, these bids were for monitoring wells and laboratory costs submitted to Ayres on other PECFA projects done roughly at the same time as the appellant's project. Ayres believes that these establish the unit cost bids it would have received from the contractors solicited had the additional services been competitively bid.

B. Assuming the contractor's competitive bids on other projects reflected what they would have bid in response to a solicitation for installation of monitoring wells and water sample analysis on the appellant's site, the lowest bids on a unit cost basis would have been from EFD for monitoring wells and MSA for water sample laboratory analysis. These are the two contractors which actually did the work without bidding on it.

9. Ayres determined that to re-bid the monitoring wells and related laboratory services would have cost an additional \$1,750. Furthermore, this avoided halting the work for approximately one month, remobilizing equipment, and incurring additional costs. Therefore, Ayres concluded that it turned out to be more cost effective to proceed with the project utilizing the already-hired contractors.

10. The appellant filed a timely appeal of the respondent's partial denial of its claim for PECFA reimbursement. After the appeal was filed, and before the appeal hearing, Linda K. Fine succeeded James Struck as the Washburn County Highway Commissioner.

11. The parties stipulated at hearing that the respondent will reimburse appellant for \$130.00 for additional laboratory costs incurred through MSA, and for up to \$3,008.46 which had been determined to be ineligible for reimbursement because the amount exceeded the \$40,000 maximum statutory limit. The respondent will pay \$3,008.46 minus any amount over the \$40,000 limit as finally determined by this decision.

DISCUSSION

In relevant part, § ILHR 47.33(1)(b)l of the Wisconsin Administrative Code, effective January 1, 1993, provides as follows:

All commodity services which include, but are not limited to, soil borings, monitoring-well construction, laboratory analysis, excavation and trucking shall be obtained through a competitive bid process. A minimum of 3 bids are required to be obtained and the lowest cost service provider shall be selected.

This rule requires that monitoring-well construction and laboratory analysis, among other commodity services, must be obtained through a competitive bid process, with a minimum of 3 bids, and selection of the lowest cost service provider. The appellant, through Ayres, did not obtain competitive bidding for monitoring well installation and laboratory analysis related to it. According to the rule, whether the lowest cost service provider was selected is dependent on and determined by the competitive bid process.

Appellant first argues that the bid process required by the rule was satisfied because EFD and MSA were originally selected as contractors by competitive bid for the other services performed. However, there was no competitive bidding on the services in question. On its face the rule clearly requires that all commodity services be competitively bid. To interpret the rule to allow for some services to be performed without competitive bidding merely because some other services had been bid by the contractor in question would defeat the purpose of the rule and allow reimbursement for performance of some commodity services without competitive bidding. Thus, if additional commodity services are required which were not originally bid, additional bidding is required under the rule.

Appellant next contends that had Ayres re-bid the additional work the lowest bidders would have been the two contractors, EFD and MSA, which actually performed the work. There was no direct evidence as to what bids the six contractors involved would have made for monitoring well installation or laboratory services on the appellant's project, other than the unit cost information provided by one of the unsuccessful bidders on the soil boring. To accept the appellant's contention requires drawing an inference from the available evidence. The available evidence is what the one contractor gratuitously included as unit price on the soil boring bid, and what the other contractors involved in bidding on the soil boring and laboratory analysis bid on other projects during the same general time period as that in question on a unit cost basis.

Evidence is lacking that these contractors routinely bid the same unit costs on all projects during the period of time in question or that they would have made the same bids on a unit cost basis as were reflected in their bids on other projects. Conceivably, there might have been factors such as economics, workload, scope or timing of a project which might have caused a contractor to vary its bid from project to project. Absent such evidence, the evidence presented does not warrant drawing the inference required by the appellant's argument that had competitive bids been solicited, EFD and MSA would have been the lowest bidders. The appellant's contention in this regard must be deemed merely conjectural.

Finally, appellant argues that the purpose of the rule is to insure cost effectiveness which was achieved in this case because the costs were reasonable and monitored by Ayres, which reviewed and approved costs. In addition, a cost savings was achieved by not re-bidding and using a contractor who was already on site and mobilized.

While this approach may have achieved cost effectiveness, it did not comply with the terms of the rule which sets forth the acceptable and palpable measure of cost effectiveness -- competitive bidding.

The respondent cites as recent and controlling precedent, the administrative appeal decision in Vern Dahl & Open Pantry Food Marts of Wisconsin v. Department of Industry, Labor and Human Relations, Hearing No. 94-49 (November 27, 1995). There, as here, monitoring wells were installed by the contractor which did the soil borings, without further bidding on such work or on an expanded scope of work in its entirety. The hearing examiner's proposed decision on that question, adopted as final by the Department of Industry, Labor and Human Relations, then administering the PECFA program, was as follows:

Although it may have been logical to conclude that using the same contractor, one that was already on site and mobilized to perform the additional work, was the most cost effective solution, without any additional comparative bids, it is not possible to draw that conclusion with any certainty. In addition, the regulations require the bidding of these specific services. Therefore, the department's determination that these costs were not reimbursable was reasonable under the circumstances.

The appellant seeks to distinguish Vern Dahl on the basis that there was some evidence in this case of additional comparative bids. However, such additional bids were solicited on, other contemporaneous projects and not for the appellant's project. For reasons discussed above, the evidence does not establish that EFD and MSA would have been the lowest competitive bids for the work. Even if the evidence did establish that fact, the absence of competitive bids cannot be ignored because so clearly stated in the rule to be required. The evidence in this case is not a sufficient basis for legal distinction from that case.

PROPOSED CONCLUSIONS OF LAW

1. The appellants are owners or agents of a property covered by the remedial provisions of § 101.143, Wis. Stats.
2. The department properly denied the appellant's request for reimbursement under the PECFA program in the amount of \$7,752.50 because the services obtained of installation of monitoring wells and related laboratory costs were not obtained through a competitive bid process, within the meaning of § ILHR 47.33(1)(b)1, Wis. Admin. Code. Vern Dahl & Open Pantry Food Marts of Wisconsin v. Department of Industry, Labor and Human Relations, Hearing No. 94-49 (November 27, 1995).
3. The additional amount of \$130 in laboratory costs incurred through Mid-States Associates, Inc. shall be reimbursed to the appellant, within the meaning of § 101.143, Wis. Stats., and § ILHR 47.30(2)(a)15, Wis. Adm. Code.
4. An additional amount not to exceed \$3,008.46 shall be reimbursed to the appellant, less any amount over \$40,000 in total reimbursement, within the meaning of §101.143, Wis. Stats., and § ILHR 47.335(2) (a) and (b), Wis. Adm. Code.

PROPOSED DECISION

The respondent's decision dated June 1, 1995 determining the reimbursement to the appellant as a result of this PECFA claim is modified to conform with the foregoing and, as modified, is hereby affirmed.

Dated: November 12, 1996.

Robert C. Junceau
Administrative Law Judge
Acting as Hearing Examiner for
the Department of Commerce